

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 25, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

No. 97-0723

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MICHAEL J. McCULLOUGH,

PLAINTIFF-RESPONDENT,

V.

**LEONARD J. LEWENSOHN, D/B/A BUSINESS RESOURCE
ASSOCIATES AND FLEISCHMANN SUPPLY CO., INC.,**

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Milwaukee County: VICTOR MANIAN, Judge. *Affirmed and cause remanded with instructions.*

Before Fine, Schudson and Curley, JJ.

PER CURIAM. Leonard J. Lewensohn, d/b/a Business Resource Associates, and Fleischmann Supply Co., Inc. (Lewensohn collectively), appeal from the trial court's judgment that they are liable for the attorney fees incurred by

Michael J. McCullough in his action to recover the earnest money he paid towards the purchase of Fleischmann Supply. Lewensohn argues that the trial court erred in granting attorney fees because: (1) the evidence is allegedly insufficient to support the trial court's findings that Lewensohn made misrepresentations to McCullough and that those misrepresentations induced McCullough to tender his earnest money; (2) the trial court allegedly erred in finding that McCullough's reliance on Lewensohn's misrepresentations was reasonable; and (3) a disclaimer on the business profile Lewensohn supplied to McCullough allegedly relieves Lewensohn of responsibility for any inaccurate representations. McCullough refutes Lewensohn's claims and requests that we award him appellate attorney fees. We affirm and remand to the trial court for a determination of the amount of appellate attorney fees to be awarded to McCullough.

I. BACKGROUND

Lewensohn is a licensed business broker who, in February of 1995, was attempting to sell Fleischmann Supply to McCullough. During negotiations, Lewensohn provided McCullough with a business profile for Fleischmann Supply. Lewensohn made the following representations to McCullough, both through the business profile and orally: (1) that the owner and general manager of Fleischmann Supply received a total cash flow in 1994 of \$40,000 from the business, consisting of a salary of \$15,500, the owner's wife's salary of \$8,000 for bookkeeping services, \$5,000 in automobile use value, \$4,500 in insurance and \$7,000 in "other" cash flow; (2) that Fleischmann had over 200 wholesale customers, and that the majority of its customers were wholesale customers rather than retail customers; and (3) that the average dollar amount of a wholesale customer purchase was between \$300 and \$1,500.

On February 22, 1995, after reviewing the business profile, McCullough gave Lewensohn a non-binding letter of intent to purchase Fleischmann Supply. Pursuant to the letter of intent, McCullough paid \$5,000 in earnest money to Lewensohn. After McCullough tendered his letter of intent and earnest money, Lewensohn provided him with Fleischmann Supply's financial statements and tax returns. McCullough then performed a due-diligence investigation and discovered that several of Lewensohn's previous representations were false. McCullough learned that the owner's 1994 salary was \$6,500; that the owner did not receive any cash flow from automobile use because he had claimed it as an ordinary and necessary business expense on his tax returns; that the "other" \$7,000 did not appear on the tax returns; that Fleischmann Supply had less than 100 wholesale customers; and that the average dollar amount of a wholesale customer purchase was significantly less than the \$300 minimum reflected on the business profile.

McCullough then withdrew his letter of intent and demanded the return of his earnest money. Lewensohn, however, refused to return the earnest money. McCullough, therefore, filed an action to recover his money. McCullough moved for summary judgment requesting his earnest money, and attorney fees based on Lewensohn's misrepresentations. The trial court granted partial summary judgment for the return of the earnest money, and set the issue of attorney fees for trial. Based on the evidence presented at trial, the trial court found that Lewensohn either knowingly or recklessly made misrepresentations to McCullough, and that McCullough relied on those misrepresentations in tendering his earnest money. The trial court, pursuant to § 100.18, STATS., therefore, awarded McCullough attorney fees incurred in the action to recover the earnest money.

II. DISCUSSION

Section 100.18, STATS., provides:

Fraudulent representations. (1) No person, firm, corporation or association, or agent or employe thereof, with intent to sell, distribute, increase the consumption of or in any wise dispose of any real estate, merchandise, securities, employment, service, or anything offered by such person, firm, corporation or association, or agent or employe thereof, directly or indirectly, to the public for sale, hire, use or other distribution, or with the intent to induce the public in any manner to enter into any contract or obligation relating to the purchase, sale, hire, use or lease of any real estate, merchandise, securities, employment or service, shall make, publish, disseminate, circulate, or place before the public, or cause, directly or indirectly, to be made, published, disseminated, circulated, or placed before the public, in this state, in a newspaper, magazine or other publication, or in the form of a book, notice, handbill, poster, bill, circular, pamphlet, letter, sign, placard, card, label, or over any radio or television station, or in any other way similar or dissimilar to the foregoing, an advertisement, announcement, statement or representation of any kind to the public relating to such purchase, sale, hire, use or lease of such real estate, merchandise, securities, service or employment or to the terms or conditions thereof, which advertisement, announcement, statement or representation contains any assertion, representation or statement of fact which is untrue, deceptive or misleading.

....

[(11)] (b) 2. Any person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and shall recover such pecuniary loss, together with costs, including reasonable attorney fees”

The trial court applied § 100.18 because Lewensohn had made oral and written misrepresentations during the negotiations with McCullough for the sale of Fleischmann Supply.

Lewensohn argues that the evidence is insufficient to sustain the trial court's finding of fact that he made misrepresentations to McCullough. He argues that the representations on the business profile were substantially correct, and that the trial court erred in finding that they were false representations.

A trial court's findings of fact will be upheld on appeal unless they are clearly erroneous. *See* § 805.17(2), STATS. Further, we must accept reasonable inferences that the trial court draws from the evidence. *See Cogswell v. Robertshaw Controls Co.*, 87 Wis.2d 243, 250, 274 N.W.2d 647, 650 (1979). The trial court found that Lewensohn misrepresented the 1994 cash flow to the owner of Fleischmann Supply, the number of wholesale customers, and the average dollar amount of a wholesale purchase. These findings are supported by the evidence and are not clearly erroneous.¹

At trial, the owner of Fleischmann Supply testified that his 1994 salary was \$6,500, rather than the \$15,500 that was reflected on the business profile. Fleischmann Supply's 1994 tax return also reflects that the owner's salary was \$6,500. This evidence clearly supports the finding that Lewensohn overstated the owner's 1994 salary by \$9,000. The tax return further reflects that Fleischmann Supply deducted the owner's automobile expenses as ordinary and necessary business expenses and that the automobile was used for business related purposes more than eighty-five percent of the time that it was used. Based upon this evidence, the trial court could reasonably conclude that the use of the automobile

¹ Lewensohn also argues that, if he did make misrepresentations, he is not liable because they were not material misrepresentations that would have effected a reasonable person's decision regarding the purchase of Fleischmann Supply. We disagree. Lewensohn's substantial overstatement of the cash flow to the owner, the number of wholesale customers, and the average purchase amount greatly effects the analysis of the profitability of Fleischmann Supply, and would be taken into account by a reasonable person considering purchasing the business.

did not contribute cash flow to the owner, and that the contrary statement on the business profile was a misrepresentation. The misrepresentations regarding the owner's salary and the value of the use of the automobile resulted in a \$14,000 overstatement of the 1994 cash flow to the owner. The foregoing evidence amply supports the trial court's finding that Lewensohn misrepresented the 1994 cash flow to the owner of the business.

McCullough further testified that, after he tendered his earnest money, Lewensohn gave him a list of Fleischmann Supply's wholesale customers, and that the list reflected only about 90 wholesale customers, rather than the 200 reflected on the business profile. He also testified that, based upon his review of accounts receivable from the wholesale customers and a review of several sales receipts, the average purchase amount was much less than the \$300 to \$1,500 represented on the business profile. The average amount of the sales shown on the list of accounts receivable is about \$180. This evidence supports the trial court's findings that Lewensohn misrepresented the number of wholesale customers and the average dollar amount of a wholesale purchase.

Lewensohn also argues that the evidence is insufficient to sustain the trial court's finding that McCullough relied on the misrepresentations. Again, the trial court's finding is supported by the evidence and is not clearly erroneous. McCullough testified that he was interested in purchasing a wholesale business, and that he relied on the representation that Fleischmann Supply had 200 wholesale customers in tendering his letter of intent and earnest money. He also testified that he relied on the cash flow to the owner and the dollar amount of wholesale purchases reflected in the business profile to evaluate the potential profitability of the business.

Lewensohn further argues that the trial court erred in finding that McCullough's reliance on the misrepresentations was reasonable. McCullough testified that he relied on the misrepresentations in the business profile when he tendered his earnest money because Lewensohn required him to submit a letter of intent and earnest money in order to receive any of Fleischmann Supply's business records. Based on this evidence, the trial court could properly conclude that McCullough acted reasonably in relying on the representations in the business profile.

Finally, Lewensohn claims that his disclaimer relieved him of responsibility for any inaccurate representations in the business profile. Citing *Grube v. Daun*, 173 Wis.2d 30, 496 N.W.2d 106 (Ct. App. 1992), McCullough responds that the disclaimer does not relieve Lewensohn of liability.

Under *Grube*, in order to be effective, a disclaimer must "make it apparent that an express bargain was struck to forgo the possibility of tort recovery in exchange for negotiated alternate economic damages." *Id.*, 173 Wis.2d at 60, 496 N.W.2d at 117. McCullough asserts that there is no evidence that Lewensohn's disclaimer was the result of an express bargain from which McCullough gained an alternate economic benefit. The disclaimer was simply appended to the business profile that Lewensohn provided to McCullough, and McCullough asserts that it is thus ineffective.

McCullough further cites *Grube* for the proposition that a disclaimer does not preclude liability for an affirmative misrepresentation. According to *Grube*, "once the seller or his agent has made an *affirmative representation* about some aspect of the property, the buyer is entitled to rely upon that statement and expect full and fair disclosure of all material facts relating to that aspect of the

property.” *Id.*, 173 Wis.2d at 61, 496 N.W.2d at 117. Lewensohn does not refute McCullough’s arguments that the disclaimer is ineffective under *Grube*. We therefore conclude that the disclaimer does not relieve Lewensohn of liability for his affirmative misrepresentations. *See Charolais Breeding Ranches, Ltd. v. FPC Sec. Corp.*, 90 Wis.2d 97, 109, 279 N.W.2d 493, 499 (Ct. App. 1979) (arguments that are not refuted are deemed admitted).

In his response brief, McCullough argues that, pursuant to § 100.18, STATS., he is entitled to recover from Lewensohn the attorney fees he incurred in responding to Lewensohn’s appeal. Section 100.18 provides that “[a]ny person suffering pecuniary loss because of a violation of this section by any other person may sue in any court of competent jurisdiction and *shall recover* such pecuniary loss, together with costs, including *reasonable attorney fees*.” Section 100.18(11)(b)2, STATS. (emphasis added). This statutory language is mandatory, and a party who prevails on appeal in a case brought under § 100.18 is entitled to reasonable appellate attorney fees. *See Radford v. J.J.B. Enterprises, Ltd.*, 163 Wis.2d 534, 551, 472 N.W.2d 790, 797 (Ct. App. 1991). We therefore remand this cause to the trial court for a determination of the amount of McCullough’s reasonable appellate attorney fees.

By the Court.—Judgment affirmed and cause remanded with instructions.

This opinion will not be published. *See* RULE 809.23(1)(b)5, STATS.

